Supreme Court, U.S.
FILED
FEB 17 2011
OFFICE OF THE CLERK

No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI, Jr.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONERS

JOSEPH A. O'BRIEN
KAROLINE MEHALCHICK
Oliver, Price & Rhodes
P. O. Box 240
1212 South Abington Road
Clarks Summit, PA 18411
(570) 585-1200

DANIEL R. ORTIZ*
TOBY J. HEYTENS
University of Virginia School of Law
Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
dro@virginia.edu
(434) 924-3127

*Counsel of Record

[Additional Counsel Listed On Inside Cover]

RECEIVED
FEB 17 2011
OFFICE OF THE CLERK
SUPREME COURT, U.S.
(32)

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, DC 20006
(202) 775-4500

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

JOHN P. ELWOOD
Vinson & Elkins LLP
1455 Pennsylvania Ave., N.W., Suite 600
Washington, DC 20004
(202) 639-6500

TABLE OF CONTENTS

Page

Table Of Authorities ii

I. Respondent And His Amici Misunderstand The Purpose And Operation Of *Connick*'s Public Concern Requirement 3

II. Respondent's Misunderstanding Of *McDonald* And *Connick* Lead Him To Mischaracterize Petitioners' Argument 6

III. Respondent Fails To Distinguish Petition From Free Speech Claims 9

IV. Respondent's Broad New Theory Of The Petition Clause Was Neither Raised Nor Considered Below, Lacks Adequate Historical Support, And Threatens To Unsettle Many Well-Established Areas Of Law 14

V. This Court Can Itself Decide Whether Respondent's Petitioning Implicates A Matter Of Public Concern 22

Conclusion 24

TABLE OF AUTHORITIES

Page(s)

Cases

Boddie v. *Connecticut*,
401 U.S. 371 (1971) 15

Bradshaw v. *Twp. of Middletown*,
296 F. Supp. 2d 526 (D.N.J. 2003) 1

Branzburg v. *Hayes*,
408 U.S. 665 (1972) 11

City of San Diego v. *Roe*,
543 U.S. 77 (2004) ..... *passim*

Connick v. *Myers*,
461 U.S. 138 (1983) ..... *passim*

Davis v. *Prudential Sec., Inc.*,
59 F.3d 1186 (11th Cir. 1995) 18-19

Foraker v. *Chaffinch*,
501 F.3d 231 (3d Cir. 2007) 1

Garcetti v. *Ceballos*,
547 U.S. 410 (2006) 12

Matsushita Elec. Indus. Co. v. *Epstein*,
516 U.S. 367 (1996) 15

NASA v. *Nelson*,
131 S. Ct. 746 (2011) 3

Page(s)

Nat'l Collegiate Athletic Ass'n v. Tarkanian,
488 U.S. 179 (1988) 19

Ortwein v. Schwab,
410 U.S. 656 (1973) 15

Pickering v. Bd. of Educ.,
391 U.S. 563 (1968) 3, 4, 13

San Filippo v. Bongiovanni,
30 F.3d 424 (3d Cir. 1994) ..... *passim*

Schlarp v. Dern,
610 F. Supp. 2d 450 (W.D. Pa. 2009) 5-6

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 10

United States v. Estate of Romani,
523 U.S. 517 (1998) 15

United States v. Kras,
409 U.S. 434 (1973) 15

Statute and Rule

5 U.S.C. § 2302(b)(8)(A) 12

Fed. R. Civ. P. 11(b)(1) 20

Page(s)

Book and Articles

Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557 (1999) ..... *passim*

Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 Ohio St. L.J. 665 (2000) 20

Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 Harv. L. Rev. 1111 (1993) 20

James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899 (1997) 20

Norman B. Smith, *"Shall Make No Law Abridging ...": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153 (1986) 1

2 Bernard Schwartz, The Bill of Rights: A Documentary History (1971) 18

Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711 (2006) 19

REPLY BRIEF FOR PETITIONERS

Respondent and his amici do not point to a single case in which this Court has applied different standards to the same conduct under the Petition and Free Speech Clauses. There is none. Respondent also does not seriously dispute that the Third Circuit's rule favoring petition claims allows public employees to circumvent *Connick*'s public concern requirement. He argues over only *how often* it does so, Resp. Br. 60-62, and offers the suggestion that the cost of attorneys, *id.* at 61, who are not generally necessary for petitioning, will somehow foreclose this concern. In the end, however, he and his amici cannot deny that the Third Circuit rule would cover the activity in *Connick* itself. As one of the commentators respondent repeatedly cites, Resp. Br. vii, notes, "[Myers] was collecting the views of her fellow workers to present to her superiors—*classic petitioning activity*." Norman B. Smith, *"Shall Make No Law Abridging ...": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1195 (1986) (emphasis added). Nor can they deny that the Third Circuit's rule applies to a mere announcement of an intention to file a claim—a simple oral "I'll sue," perhaps never to be acted upon. *See Bradshaw* v. *Twp. of Middletown*, 296 F. Supp. 2d 526, 546 (D.N.J. 2003).

Respondent and his amici also do not contend that the Third Circuit's justification for placing the Petition above the Free Speech Clause—that petitions do "not appeal[] over government's head to the general citizenry," *Foraker* v. *Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007) (quoting *San Filippo* v.

Bongiovanni, 30 F.3d 424, 442 (3d Cir. 1994) can support their result. Instead, they abandon the Third Circuit's rationale in favor of a novel theory not argued or considered below—that at bottom the Petition Clause protects access to the courts or, as one amicus candidly describes it, a "right to litigate," AFL-CIO Amicus Br. 7-8. This justification, however, creates a hierarchy not only between speech and petitions but also among different types of petitions themselves. Under respondent's view, lawsuits would count as petitions but traditional petitions to Congress by public employees would not. See Resp. Br. 59-60 (defining how the Petition Clause covers public employees); see pp. 21-22, *infra*.

Respondent and his amici also do not deny that federal and state law and private labor agreements create a comprehensive and carefully tailored remedial mechanism that the Third Circuit's one-size-fits-all rule effectively displaces. Nor does respondent contest that public employers potentially faced with constitutional claims (and attorney's fees) for disciplining an employee will hesitate to manage the public work force effectively.

Instead, respondent and his amici (1) try to understate the conflict between the Third Circuit's rule and this Court's holdings in its public employment cases by mischaracterizing the purpose and operation of *Connick*'s public concern requirement and (2) seek to relitigate the case under a breathtakingly broad access-to-courts theory pressed and considered nowhere below—a theory that lacks adequate historical justification and fails to fit respondent's own case or the Petition Clause

more generally. As a result, much of respondent's effort, particularly his long historical exegesis, is simply misdirected.

I. RESPONDENT AND HIS AMICI MISUNDERSTAND THE PURPOSE AND OPERATION OF *CONNICK*'S PUBLIC CONCERN REQUIREMENT

Just last month in *NASA* v. *Nelson*, 131 S. Ct. 746 (2011), this Court reiterated how differently courts should review public employment claims from claims involving the general citizenry:

> When the Government asks [employees to do something], it does not exercise its sovereign power to regulate or license. Rather, the Government [acts] in its capacity as proprietor and manager of its internal operation. Time and again our cases have recognized that the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large. This distinction is grounded on the common-sense realization that if every employment decision became a constitutional matter, the Government could not function.

Id. at 757-758 (citations and quotation marks omitted).

In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), this Court held specifically that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the speech of the citizenry in general," *id.* at 568, and that in such

cases the courts should "balance * * * the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *ibid.*

In *Connick* v. *Myers*, 461 U.S. 138 (1983), this Court further held that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147. *Connick* thus recognized that when no matter of public concern is involved it makes no sense to proceed to full *Pickering* balancing because the employee has no relevant interests to be balanced against his employer's. When that is true, the case is appropriately dismissed at the start. As this Court explained in *City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (per curiam), the purpose of *Connick*'s public concern requirement is to avoid *Pickering* balancing, which itself can frustrate effective government:

> To require *Pickering* balancing in every case * * * could compromise the proper functioning of government offices. This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit

> *Pickering* balancing, a public employee's speech must touch on a matter of "public concern."

Id. at 82-83 (citation omitted). There is simply no reason to balance the employee's interests against the employer's and subject the employer to further court process when the employee asserts no injury to an interest that the First Amendment recognizes as relevant.

Respondent fails to understand this logic. Although he nowhere cites *Pickering*, respondent concedes that balancing represents the proper approach. Resp. Br. 35-40. He would have the courts balance, however, "in each case," *id.* at 39, regardless of whether the employee has shown that any of his cognizable interests "as a citizen," not just his "personal interest" "as an employee," were implicated. See *Connick*, 461 U.S. at 147. Such an approach makes no sense. Contrary to *Connick*'s teaching, it would subject the employer to needless process and expense. Only if the public employee can show some interest "as a citizen," which means at the least that his actions concern something more than ordinary employment matters, there is simply no point to bringing the public employer to court.

Indeed, federal courts within the Third Circuit understand this logic, although there it cuts in the opposite direction. Recognizing that *Connick*'s public concern requirement functions as a short-cut to terminate at an early stage litigation that will necessarily fail full *Pickering* balancing, they reason that the Third Circuit's rejection of *Connick*'s public concern requirement necessarily implies a rejection of any *Pickering* balancing as well. See, *e.g.*, *Schlarp*

v. *Dern*, 610 F. Supp. 2d 450, 466 n.9 (W.D. Pa. 2009) ("[B]ecause the Petition Clause [under the Third Circuit's rule] affords individuals a right separate and distinct from that protected under the Free Speech Clause, the viability of a claim under the Petition Claus does not depend upon whether the specific criteria enunciated in *Pickering* * * * have been satisfied.") (citing *San Filippo*, 30 F.3d at 438-443). They understand that rejecting *Connick* means rejecting *any* balancing under *Pickering* and thus grant petitions unique constitutional protection. Against the grain of all this Court's public employment cases, the public employer's interests in effectively managing its workforce count for nothing. Respondent thus argues for an approach—applying full *Pickering* balancing in every case—that not only is illogical and causes needless disruption, but also is rejected by the very courts he believes apply the correct standard.

II. RESPONDENT'S MISUNDERSTANDING OF *MCDONALD* AND *CONNICK* LEAD HIM TO MISCHARACTERIZE PETITIONERS' ARGUMENT

Respondent's misunderstanding of *Connick* and constitutional public employment law, more generally also leads him to severely mischaracterize petitioners' arguments. Petitioners do not, for example, argue that the "very act of petitioning is not protected by the Constitution," Resp. Br. 7, that there is "no constitutionally protected right to file * * * grievance[s] and section 1983 actions," *id.* at 13, that "claims for workmen's compensation * * * ought not be protected by the petition clause," *id.* at 29, or,

even more surprisingly, that "THE PETITION CLAUSE [DOES NOT] PROTECT[] PETITIONS THAT ARE NOT ABOUT MATTERS OF PUBLIC CONCERN," *id.* at 22, a proposition respondent devotes nearly a quarter of his argument, *id.* at 22-34, to refuting. The question is rather how and to what extent the Constitution protects a public employee who engages in such conduct.

Indeed, *Connick* itself makes clear that public employee expression subject to its rule nonetheless receives constitutional protection, just not the degree and form respondent seeks. As the *Connick* Court made clear in carefully delimiting the scope of its holding,

> We do not suggest * * * that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. The First Amendment does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with smaller ones, are guarded. We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that when a public employee speaks not as a citizen upon matters of

> public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.

461 U.S. at 147 (internal citations and quotation marks omitted). Applying *Connick* to petition claims simply cannot mean that petitions on matters of private concern would receive no constitutional protection because *Connick* itself expressly rejected that possibility. Criminalizing petitioning the legislature on particular private subjects would, for example, raise grave constitutional doubts. The question this case presents, in other words, is not whether particular activity is "protected" under the Petition Clause, but whether such protection necessitates a broad, unprecedented exception to the general rule that government employment decisions do not ordinarily raise constitutional questions.

Nor do petitioners argue that public employers should be "free to retaliate against any employee who resort[s] to arbitration," Resp. Br. 58, or that states and localities should be able to "forb[id their] employees to sue [them] * * * and * * * dismiss any worker who d[oes] so," Br. in Opp. 30-31. That is like claiming that the employer in *Connick* argued

that states and localities could forbid all their employees from saying bad things about them and dismiss any who did so. Petitioners argue simply that the public employment policies that this Court has found exceedingly important in related free speech cases should have equal purchase in petition cases. The particular type of action an employee takes to complain—speech or petition—makes no difference as to any of the policies the *Connick* rule exists to vindicate.

III. RESPONDENT FAILS TO DISTINGUISH PETITION FROM FREE SPEECH CLAIMS

Respondent makes several attempts to distinguish petition from free speech claims, not one of which is successful. First, he argues that *McDonald* is not controlling because this case involves "petitioning as such," Resp. Br. 11-12, and "the very act of petitioning," *id.* at 13, whereas *McDonald* concerns only "statement[s] in a petition," *id.* at 9. This is a distinction without a difference and is, moreover, dubious on the facts. Petitioning is inherently expressive activity. It makes little sense to discuss a petition independent of its content and less still to argue that the mere act of petitioning deserves greater constitutional protection than this Court has provided for a petition's contents. See Resp. Br. 13 ("Had Guarnieri alleged that the defendants retaliated against him because of a particular statement in the grievance or complaint, that would present a different issue."). Such an approach, in fact, turns existing First Amendment doctrine upside-down. As this Court has long held,

"content-neutral" restrictions are generally subject to less sweeping review than "content-based" restrictions because the former "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994).

Under respondent's own view of the case, moreover, petitioners acted against him not because he simply petitioned government but because of what his petitions represented. As in *Connick* itself, they constituted just "another round of controversy with [his] superiors" over a personnel action. 461 U.S. at 148. That the added rounds occurred in arbitration and in court and involved more players, like lawyers, judges, and arbitrators, make them more disruptive to the public employer's management, not less.

Second, respondent argues that "*Connick* is not controlling here because that decision held only that a public concern requirement applies to constitutional claims that a statement by a public employee is protected by the free speech clause." Resp. Br. 14. That is, of course, trivially true. *Connick* did not concern the Petition Clause. But its policies apply as strongly in the one context as in the other.

Third, respondent contends that adopting *McDonald*'s principle of parity would make the Petition Clause "entirely redundant." Resp. Br. 15. But to the extent there is "redundancy" between these Clauses, *McDonald* is hardly the cause. "There were certainly petitions that did not constitute speech when the First Amendment was

ratified." *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 450 (3d Cir. 1994) (Becker, J., concurring and dissenting). Over time, however, the expansion of free speech has narrowed that category. *Ibid.* As a general matter, moreover, such "redundancy" is hardly a problem. The Speech and Press Clauses may overlap substantially, see, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 684 (1972), but no one mourns the latter provision as a "dead letter," *San Filippo*, 30 F.3d at 450 (Becker, J., concurring and dissenting).

Fourth, respondent argues that "[t]he practical and legal issues raised by speech and by petitioning are sufficiently different that the standard governing free speech cases should not be presumed to apply as well to petition clause claims, or vice versa." Resp. Br. 16. This, of course, turns *McDonald* on its head and the "differences" respondent points to offer weak, if any, support for doing so. That speech claims, for example, often address actions "at work," *ibid.*, whereas petitioning claims often address actions taken outside the employee's office, *id.* at 17, matters little when the actions—wherever they occur—affect the morale and management of the workplace itself. In general, the practical challenges the government faces as employer are at least as substantial when an employee files a formal grievance or lawsuit as when that employee lodges an informal complaint or simply engages in speech. Indeed, the Third Circuit itself has recognized that "employee lawsuits and grievances against a public employer can * * * be divisive in much the same way that employee speech can be." *San Filippo*, 30 F.3d at 441. The consequences of "constitutionaliz[ing]

the employee grievance," *Garcetti* v. *Ceballos*, 547 U.S. 410, 420 (quoting *Connick*, 461 U.S. at 154), are thus just as serious—if not more so—in the context of the Petition Clause.

Similarly, although respondent acknowledges that "*Connick* protects a public employer's 'broad discretion in responding to employees' purely work-related complaints,'" Resp. Br. 18 (quoting Pet. Br. 13), he believes it does not do so when those complaints happen to be embodied in particular types of petitions, *id.* at 19. But those complaints are still "purely work-related." Their presence within a grievance or lawsuit does not transform them into something of greater and wider concern.

Respondent also speculates that applying *Connick*'s public concern requirement to petitions would frustrate a need of Congress to receive petitions from federal employees. Resp. Br. 19-20. It suffices to say, however, that Congress has comprehensively legislated in this area and provided remedies, when appropriate. 5 U.S.C. § 2302(b)(8)(A). Most such complaints, moreover, would come through simple speech rather than through more formal petitions. In addition, since Congress does not ordinarily have the power to reinstate or set the work terms and conditions of individual federal employees, respondent's own view of the Petition Clause would not cover this particular type of petition. See Resp. Br. 59-60 (defining when public employee activity constitutes petitioning); p. 21, *infra*.

Respondent also contends that *Connick*'s public concern requirement should not apply to petitions

because whereas "the content of speech subject to *Connick* is immediately known, * * * whether a petition will involve a matter of public concern may not be knowable when the petitioner initially seeks redress." Resp. Br. 20. He envisions that, as here, an ordinary work-related complaint may implicate an issue of law that could reach the Supreme Court. *Id.* at 22 ("It is difficult to understand how the public concern requirement could be applied to a federal or state lawsuit [where Supreme Court review was] at least a possibility when it was first commenced.").

Respondent confuses, however, the employee's *underlying activity* with the *issue of law* his case might present. *Connick* concerns the former, not the latter. It asks whether the "public employee 'as a citizen'" was "commenting upon matters of public concern," 461 U.S. at 143 (quoting *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968)), not whether his expression might result in a case raising a legal issue that would later reach this Court. Indeed, if that were the case, all the speech in *Connick* itself would necessarily have satisfied the public concern requirement. But, of course, it did not. And why stop there? Since the *Connick* legal standard itself was once a matter of public concern, should it not still be so? People still litigate it and this Court still considers its ramifications. See, *e.g.*, *City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (per curiam). By respondent's logic, any case applying the *Connick* standard would necessarily implicate a matter of public concern, namely, the scope and validity of the *Connick* rule itself. That would mean, however, that merely invoking the *Connick* standard would

automatically defeat it. Whatever *Connick* means, it cannot mean that.

IV. RESPONDENT'S BROAD NEW THEORY OF THE PETITION CLAUSE WAS NEITHER RAISED NOR CONSIDERED BELOW, LACKS ADEQUATE HISTORICAL SUPPORT, AND THREATENS TO UNSETTLE MANY WELL-ESTABLISHED AREAS OF LAW

Respondent and his amicus the ACLU argue that this Court should adopt a theory of the Petition Clause that grounds it in a general right of access to the courts. This Court has never held the Petition Clause to be so expansive and there is no reason for it to do so now.

First, respondent did not raise this theory in either of the courts below. Respondent's brief to the court of appeals spends few words on the retaliation issue and those few almost exclusively argue that the Third Circuit should apply *San Filippo* as binding circuit precedent. That brief notably omits any mention of "right of access to the courts." *See* Resp. C.A. Br. 37-39. Despite its extensive development by both respondent and the ACLU in their merits briefs, the theory made its very first appearance in this litigation in respondent's brief in opposition, *see* Br. in Opp. i. While the courts below were asked to consider and decided a claim grounded in the First Amendment, the sweeping right of access claim respondent and the ACLU now press "implicates not only the petition clause, but also the due process clauses of the Fifth and Fourteenth Amendments and the privileges and immunities

clause of Article IV of the Constitution." ACLU Amicus Br. 3. Even if these new legal theories had any bearing on respondent's own case, which they do not, respondent advanced none of them below, neither court considered them, and this Court should not now hear them. *United States* v. *Estate of Romani*, 523 U.S. 517, 526 n.11 (1998) (noting that although a "respondent may defend [a] judgment on a ground not previously raised[, this Court] will rarely consider such an argument."); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) (same).

Respondent switches horses mid-course, however, for good reason. This Court's long-held view of the Petition Clause does not grant him the remedy he seeks. Although it may offer lawsuits some protection as petitions, it does not grant public employees the near absolute protection respondent wants. His new access-to-courts theory offers more protection, to be sure, but only to those lawsuits involving "fundamental rights." Compare *Boddie* v. *Connecticut*, 401 U.S. 371, 383 (1971) (finding right of access to courts allows an indigent, who cannot afford to pay court filing fees, to petition for divorce because marriage is a "fundamental human relationship" and the marital union may be severed only by the government), with *United States* v. *Kras*, 409 U.S. 434 (1973) (refusing to extend right of access to courts to cover filing fees in bankruptcy proceedings), and *Ortwein* v. *Schwab*, 410 U.S. 656 (1973) (per curiam) (refusing to extend it to cover filing fees in post-hearing review of decision to reduce welfare benefits). And this Court has never interpreted that right so broadly as to protect

ordinary work-related complaints a public employee pursues through some official process. By arguing that the Petition Clause should encompass the right of access to courts, respondent hopes to leverage the greater stringency of review the latter applies to cases involving "fundamental rights" to the wide range of petitions the former covers. The Petition Clause does not support such a sweeping change, which would unsettle many areas of law, including those concerning court process. See pp. 19-21, *infra*.

Respondent's historical argument for placing the right of access to courts at the heart of the Petition Clause is quite weak. In an article extensively cited by both respondent and the ACLU, Resp. Br. v; ACLU Amicus Br. iv, Professor Carol Rice Andrews addresses these historical arguments, see Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557 (1999). Andrews notes that while some individuals, such as prisoners, have a substantive due process right to file civil suits, that right for the people at large was, at the time of her writing—only a decade ago—just "emerging" in Petition Clause jurisprudence. *Id.* at 557.

Although Andrews argues for finding a right of access to courts in the Petition Clause because "this new principle * * * can at least partially fill the gap left by the Court's [substantive] due process decisions," Andrews, *supra*, at 560, she candidly notes that "[t]he historical record offers little insight into the mere existence of a right to petition courts, let alone the proper contours of that purported right," *id.* at 561. "To be sure," she later writes, "the

right of access to courts under the Petition Clause is a 'new' constitutional precept," *id.* at 595, and quickly adds, "[u]nfortunately, there is a paucity of information to tell us whether the drafters of the First Amendment actually intended the Petition Clause to encompass civil court filings," *ibid.* As she summarizes the evidence with scholarly honesty,

> We can at least say that the history, text, and policies of the Clause are not inconsistent with an application of the right to petition to the courts. In other words, a plausible argument can be made that the Petition Clause does protect, at least to some degree, a person's right to file a civil lawsuit.

Ibid. Her caveats—"not inconsistent with," "a plausible argument," and "protect, at least *to some degree*"—undermine respondent's claim that the relevant history supports his peculiarly expansive view of the Petition Clause. Imagine the Framers' and Radical Republicans' reaction to the proposition that the Petition Clause limited the government's power to discipline public employees for any reason, let alone that it required federal courts to entertain every claim that an adverse action against a government employee was "really" based on his prior complaining activity.

Andrews, in fact, sees the Petition Clause's history much as petitioners do. She notes that "the new American states preserved the [petition] right, if at all, only as to the *legislature*," Andrews, *supra*, at 605, and that "at least Madison, and likely most of his contemporaries, understood the right to petition as part of the system by which the First Amendment

would guard the people's right to 'communicate their will' to their government," *id.* at 624 (quoting James Madison, House Debates (Aug. 15, 1789), *reprinted in* 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1096 (1971)). To her mind, the historical argument for applying the Petition Clause to court actions rests almost entirely on the belief that "in post-revolutionary America, a petition to the legislature was viewed as a fundamental right and served as a means of securing redress of private grievances. The 'right to petition' thus protected the right to present individual petitions [to legislatures] that *today* would constitute a civil action in court." *Id.* at 611 (emphasis added). In other words, the historical case for "the right of court access under the Petition Clause," *id.* at 625, turns on courts today handling some matters that legislatures used to.

This is slender support, indeed, for a broad right of access to courts under the Petition Clause, particularly one that would encompass, as respondent contends, arbitration and other alternative dispute resolution mechanisms that work entirely outside the court system and that the parties themselves have agreed through voluntary contract to have substitute for court process. That Congress or the federal government in 1789 might have settled some disputes that private arbitrators do today does not mean that complaints addressed to arbitrators constitute petitions. Indeed, all federal courts that have considered the issue have held that government facilitation, regulation, and enforcement of arbitration contracts do not constitute state action. See, *e.g.*, *Davis* v. *Prudential Sec., Inc.*, 59

F.3d 1186, 1190-1192 (11th Cir. 1995); see also Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1758 n.206 (2006) (collecting cases). Respondent's citation of *National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988), for the proposition that an arbitrator who hears grievances under a collective bargaining agreement with a public employer is "a government actor for constitutional purposes," Resp. Br. 56-57, is wide off the mark. In *Tarkanian*, this Court held that a party overseeing "enforcement proceedings * * * cannot be regarded as an agent of [the government]" if it acts "at odds with the State." 488 U.S. at 196. In other words, an arbitrator's "interest in the effective and evenhanded enforcement of [contractual terms]" does not transform her into a state actor. *Ibid.*

Professor Andrews also honestly describes the dangers creating this new right under the Petition Clause could pose. As she puts it, recognizing this new guarantee

> could wreak havoc upon the very courts it purports to protect by calling into question the system by which courts operate. First Amendment rights are "supremely precious" freedoms and are subject to heightened protection. An undefined right of judicial access under the First Amendment could call into question any law that purports to limit or regulate civil filings, including existing rules of procedure.

Andrews, *supra*, at 560 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)) (footnote omitted). Embracing the "right to litigate" as part of the right to petition would raise several troubling issues. Just to start, are sovereign immunity barriers to lawsuits an unconstitutional burden on petition rights, as at least one article cited by both respondent and the ACLU argues? See Resp. Br. 32 n.31, 44 n.38, 52 & n.42 (citing James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899 (1997)); ACLU Amicus Br. 12 (same). Are Rule 11 sanctions for filing a lawsuit for "any improper purpose, such as to harass," Fed. R. Civ. P. 11(b)(1), unconstitutional, as Professor Andrews herself argues in another article, see Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 Ohio St. L.J. 665, 796 (2000) ("Federal Rule 11(b)(1) * * * violate[s] the First Amendment.")? Are federal and state statutes barring lawsuits brought solely for vexatious or otherwise improper motives similarly unconstitutional, as Professor Andrews also argues, *id.* at 797-800 ("[T]o the extent that the court relies on motive to curb access, [doing so] is invalid."), despite the considered judgments of state legislatures that such litigation frequently runs afoul of numerous societal interests and compromises the integrity of the courts? Are Rule 11 sanctions for filing a suit without "inquiry reasonable under the circumstances," Fed. R. Civ. P. 11(b), unconstitutional, at least when filed against the government, as a note in the Harvard Law

Review argues? See Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 Harv. L. Rev. 1111, 1124-1127 (1993). Do individuals enjoy a constitutional right to appeal in civil cases since the courts of appeals are, after all, as much a part of "the government" as the trial courts? Do individuals have a right under the Petition Clause for judicial review of any government action that causes them a grievance? These are just a few of the questions that adopting respondent's view of the Petition Clause would raise.

Respondent argues that petitioners improperly attempt to limit the protection of the Petition Clause to its "core," *e.g.*, Resp. Br. 35-40. That is not accurate. Petitioners contend merely that the Petition Clause offers no cause of action to a public employee disgruntled in his job unless the action is grounded on a matter of public concern. Pet. Br. 58. It is certainly true, however, that respondent does not seek to ground the Petition Clause in its core. Rather, he seeks to invert its core and periphery. He sees a Petition Clause largely defined by a right of access to courts or, as one amicus honestly puts it, a "right to litigate," AFL-CIO Amicus Br. 8. Indeed, he believes the clause covers any action in which "the employee may be represented by an attorney," Resp. Br. 60, but curiously not a traditional petition to the legislature, unless, of course, the employee hires an attorney to write it, see *id.* at 59-60 (delimiting three types of cognizable public employee petitions, none of which appears to cover an employee petitioning the legislature unless the legislature has the power to rehire or set the terms

and conditions of employment of individual employees).

Such a litigation-centric view not only favors petitions over similar speech but also favors some petitions—those involving litigation broadly conceived—over all others. Respondent offers no historical evidence that the Petition Clause warrants that. His difficulty shows, moreover, the line-drawing problems that this Court would face if it goes down his road. It will have to distinguish not only between petitions and speech, an enterprise fraught with difficulty, see Pet. Br. 29-34, but also among different types of petitions to separate those worthy of more from those worthy of less protection.

V. THIS COURT CAN ITSELF DECIDE WHETHER RESPONDENT'S PETITIONING IMPLICATES A MATTER OF PUBLIC CONCERN

Because courts within the Third Circuit understand that not applying *Connick*'s public concern requirement to petitions necessarily entails not applying any form of *Pickering* balancing to them, see pp. 5-6, *supra*, no court has yet considered whether respondent's underlying complaints involve any matter of public concern. Thus, a vacatur and remand for such a determination is not inappropriate. That issue, however, "is one of law, not fact," *Connick* v. *Myers*, 461 U.S. 138, 148 n.7 (1983), which this Court can determine, if it wishes, from examining "the content, form, and context of [the petition], as revealed by the whole record," *id.* at 147-148. In making this determination in *City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (per curiam),

this Court acted summarily after holding that the "cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of [expression]." *id.* at 83-84.

Under this controlling standard, respondent's petitioning involves no matter of public concern. Like the questionnaire in *Connick*, respondent's initial grievance and lawsuit, "if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo." *Connick*, 461 U.S. at 148. The district court held that petitioners had retaliated against respondent by issuing the directives and withholding overtime. Pet. App. 17a-18a. The Third Circuit upheld those holdings. *Id.* at 15a. As the jury instructions make clear, the first act was tied exclusively to respondent's initial grievance; the second exclusively to his lawsuit. C.A. App. A00770. Both the lawsuit and initial grievance, however, ultimately rest on the same dispute: whether the Borough's decision on February 7, 2003 to terminate respondent's employment was for "just cause." J.A. 14. As the arbitrator's report makes clear, that underlying dispute involved no matter of public concern. J.A. 13-38. His summary of the issues in his final holding shows only work-related conflicts, although admittedly serious ones:

> The evidence shows that Mr. Guarnieri was guilty of using tactics to evade, if not defy, the authority of Borough Council can [sic] of attempting to intimidate Council members.

> Certainly his conduct deserved discipline. Mr. Guarnieri had received three written reprimands, with the first two correcting the specified unacceptable behavior. No major violation occurred between the last reprimand and the termination action. Council has every right to expect any Chief of Police to follow its policies and directives and to abide by budget constraints. At the same time, Council must confront unacceptable conduct when it occurs and utilize discipline in a manner that conveys to employees its expectations and the consequences of not doing so. For the most part that was not done in this case. Moreover, in initiating and completing the termination, Council committed significant procedural errors, which further weakened the Borough's position. Mr. Guarnieri's behavior cannot be condoned and is worthy of discipline, but the Borough has failed to prove it had just cause for its decision to discharge Mr. Guarnieri on February 7, 2003.

J.A. 37-38. This Court itself can easily determine that respondent has failed to satisfy *Connick*'s public concern requirement.

CONCLUSION

The decision below should be vacated and the case remanded for proceedings consistent with an opinion holding that public employees cannot sue their employers for retaliation under the Petition Clause unless their petitions involved matters of public concern. This Court itself may, if it wishes,

determine that respondent's petitioning involves no such matters.

Respectfully submitted.

JOSEPH A. O'BRIEN
KAROLINE MEHALCHICK
Oliver, Price & Rhodes
P. O. Box 240
1212 South Abington Road
Clarks Summit, PA 18411
(570) 585-1200

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, DC 20006
(202) 775-4500

DANIEL R. ORTIZ*
TOBY J. HEYTENS
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
dro@virginia.edu
(434) 924-3127

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

JOHN P. ELWOOD
Vinson & Elkins LLP
1455 Pennsylvania Ave., N.W., Suite 600
Washington, DC 20004
(202) 639-6500

*Counsel of Record

February 2011